2008

Sunridge v. RB and G Engineering, Inc. : Brief of Appellee

Utah Court of Appeals

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
Stephen Quesenberry, Charles Perschon; Hill, Johnson & Schmultz; attorneys for appellants.
Craig C. Coburn, Zachary E. Peterson; Richards, Brandt, Miller & Nelson; attorneys for appellee.

IN THE UTAH SUPREME COURT

SUNRIDGE DEVELOPMENT CORPORATION AND SUNRIDGE ENTERPRISES, LLC, Plaintiffs/Appellants, vs. RB&G ENGINEERING, INC., Defendant/Appellee.	Case No. 20080160

BRIEF OF APPELLEE

On Writ of Certiorari from the Utah Court of Appeals

STEPHEN QUESENBERRY
CHARLES PERSCHON
HILL, JOHNSON & SCHMUTZ, LLC
RiverView Plaza
4844 North 300 West, Ste. 300
Provo, Utah 84604
Telephone: (801) 375-6600
Fax No.: (801)3753865
Attorneys for Appellants

CRAIG C. COBURN [0688]
ZACHARY E. PETERSON [8502]
RICHARDS, BRANDT, MILLER & NELSON
Attorneys for Hanson Equipment, Inc.
Wells Fargo Center, 15th Floor
299 South Main Street
P.O. Box 2465
E-mail: craig-coburn@rbmn.com
zachary-peterson@rbmn.com
Salt Lake City, Utah 84110-2465
Telephone: (801) 531-2000
Fax No.: (801) 532-5506
Attorneys for Appellee RB&G Engineering

PARTIES TO THE PROCEEDING

The front caption contains all of the parties to the proceeding.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

QUESTIONS PRESENTED FOR REVIEW

Issue 1: Did the Court of Appeals correctly conclude that an assignee is limited the assignor's damages when presenting an assigned breach of contract claim and thereby correctly resolve the Sunridge entities' breach of contract claims?

Issue 2: Did the Court of Appeals properly conclude that both of the Sunridge entities' tort claims failed as a matter of law and thereby properly affirm the trial court's summary judgment rulings?

STANDARD OF REVIEW: "On certiorari, we review the decision of the court of appeals, not the decision of the trial court. In doing so, this court adopts the same standard of review used by the court of appeals: questions of law are reviewed for correctness, and the trial court's factual findings are reversed only if clearly erroneous." *Dowling v. Bullen*, 2004 UT 50, ¶7, 94 P.3d 915.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the Court of Appeals' decision pursuant to Utah Code Ann. 78-2-2(3)(a).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS

None are dispositive of the issues on appeal.

STATEMENT OF THE CASE

Nature of the Case

Notwithstanding the arguments to the contrary, this case is a breach of contract case between Sunridge Development Corporation (SDC) and RB&G. SDC and RB&G entered into a contract in order to have RB&G prepare a Preliminary Geology analysis for a proposed development – Sunridge. After RB&G performed on its contract with SDC, a new Sunridge entity, Sunridge Enterprises, LLC (SEL) was created in order to limit liability. SDC sold the land for the Sunridge development to SEL and purportedly assigned all of its right in its contract with RB&G to SEL. After the sale and assignment, however, SDC continued to work on the Sunridge project and to be a party to the RB&G contract.

In this action, SDC and SEL each asserted contract and tort claims against RB&G. During discovery, RB&G learned that SDC and SEL each claimed separate categories of damages. Each Sunridge entity incurred separate and distinct damages, which each Sunridge entity then sought in separate causes of action. As the Sunridge entities' brief points out, the only category of damages at issue in this appeal is SEL's claim for lost revenue from its inability to build and sell fourteen units.

FACTS

SDC contracted with RB&G

This case is based on the Sunridge entities' development of the Alpine Brook Townhome development located in Provo, Utah. (R. at 230). In 1981, Sunridge Development Corporation (SDC) purchased an 87-acre parcel of property, 10.2 acres of which would later become the Alpine Brook development. (R. at 372). In 1993, SDC contracted with RB&G to perform a Preliminary Geology analysis of a proposed development known as Sunridge, which would include the Alpine Brook development. (R. at 231). On June 23, 1993, RB&G submitted its analysis report to SDC. (R. at 231). In 1995, SDC again contracted with RB&G to perform a Preliminary Geology analysis of the Alpine Brook development, and in August 1995, RB&G submitted its analysis report to SDC. (R. at 231). These two contracts between SDC and RB&G are the only contracts at issue in this appeal and were performed between 1993-1995. (R. at 548).

Sunridge created SEL in 1996

SDC is a Utah corporation formed in March 1969. (R. at 230). Stephen G. Stewart is a principal of SDC. (R. at 233). Sunridge Enterprises, L.L.C. (SEL) was created in March 1996 for the purpose of buying the Alpine Brook development. (R. at 374; 230; 253). Stephen G. Stewart is also a principal of SEL. (R. at 233). SEL was intentionally created as a separate entity to limit or allocate the Sunridge entities' liability exposure. (R. at 268). When asked in his deposition why SEL was created as a separate

entity, Mr. Stewart responded: “Our attorneys told us the liability exposure would be less with an LLC.” (R. at 268).

SDC sold the Alpine Brook parcel to SEL in 1996. (R. at 374). Accordingly, SEL never entered into a contract with RB&G, as SEL was created after the SDC-RB&G contracts were entered into and after RB&G had performed on the contracts. (R. at 548). At the time of sale, SDC purportedly assigned and transferred all of its rights and claims regarding the various engineering reports, surveys, studies, and zoning approvals, etc., to SEL. (R. at 374). Other than Mr. Stewart's affidavit, however, no proof of this assignment has ever been entered into the record. Additionally, RB&G completed performance of its contracts with SDC prior to any purported assignment of SDC’s contract rights to SEL. (R. at 550). Thus, at the time of the purported assignment, SEL’s only remaining right on the RB&G contracts was the right to enforce those contracts in the event of a RB&G error or omission in its geologic analysis and to pursue SDC’s remedies resulting from any such breach. (R. at 550). This was the only right that SDC could have assigned to SEL. (R. at 550). The record is devoid of any assignment of claims running from SEL to SDC. Finally, although SDC assigned its rights to SEL, SDC continued to function as a corporate entity.

Procedural Details of Case

Trial Court

The Sunridge entities filed suit against RB&G on February 5, 2003, for its alleged breach of the SDC/RB&G contracts and/or for RB&G's negligent acts, errors or omissions in the performance of the contracts. (R. at 1). In the Amended Complaint, the Sunridge entities jointly alleged that RB&G breached its contract(s) with SDC and negligently performed its services, thereby damaging the Sunridge entities. (R. at 14).

i. RB&G's first summary judgment motion.

RB&G filed a Motion for Summary Judgment and Partial Summary Judgment on the negligence and breach of contract claims on March 8, 2005. (R. at 225). In this first summary judgment motion, RB&G argued both SDC's and SEL's tort claims were barred by the economic loss rule. Also, RB&G argued that SEL could not assert its own breach of contract claim due to lack of privity. In opposition to RB&G's motion and for the first time in the case, the Sunridge entities argued that SDC had assigned its rights under the contract to SEL. Also, the Sunridge entities argued that RB&G owed an independent legal duty to SEL in order to avoid the economic loss rule. (R. at 362-390). On August 2, 2005, the trial court granted RB&G's motion for summary judgment and partial summary judgment holding that SDC's and SEL's negligence claims were barred by Utah's economic loss rule and that the lack of contractual privity between SEL and

RB&G limited SEL's ability to recover damages, as an assignee, to those damages suffered by SDC. (R. at 538-42, 548-552).

ii. RB&G's second summary judgment motion

RB&G submitted a second motion for summary judgment on July 25, 2006, with respect to SDC's claims. (R. at 575). In this motion, RB&G argued that SDC had failed to produce sufficient evidence to prove its damages. Specifically, although SDC produced an affidavit summarizing its damages, SDC failed to provide any of the underlying documentation to prove its generalized summary. The trial court also granted RB&G's second summary judgment motion. (R. at 697, 722-27). In short, as a result of the trial court's rulings on these two summary judgment motions: (i) SDC's and SEL's negligence claims had been dismissed pursuant to the economic loss rule; (ii) SEL's breach of contract claim had been dismissed for lack of privity; and (iii) SDC's breach of contract claim, whether asserted by SDC or SEL, had been dismissed for failure to prove damages.

The parties then entered into a stipulation to expedite this appeal whereby both Sunridge entities agreed not to appeal the trial court's second summary judgment ruling on proof of SDC's damages. (R. at 736). The stipulated motion to dismiss with prejudice SDC's remaining claims for lack of proof of damages was entered on December 18, 2006. (R. at 736-37) Accordingly, the second summary judgment motion and SDC's

damages are not before this Court on appeal, and this appeal addresses solely the issues from the August 2, 2005 ruling on RB&G's first summary judgment motion.

Court of Appeals

On appeal from the trial court, the Sunridge entities presented two issues: (1) whether SEL could recover its own damages for the loss of the 14 units through an assigned breach of contract claim; and (2) whether the trial court erred in its conclusion that SDC could not recover on its negligence claim because of the economic loss rule. These two issues are the same arguments advanced to this Court on Certiorari.

With respect to SEL's assigned breach of contract claim, the Court of Appeals properly disposed of this when it addressed the law of assignments. Specifically, the Court of Appeals correctly stated: "Under the law of assignments, '[assignees] are entitled to bring against the [obligor] any contractual action the [assignor] could have brought." *See Sunridge Development Corp. v. RB&G*, 2007 UT App 29 at ¶8. Thus, the Court of Appeals properly affirmed the trial court's grant of summary judgment with respect to SEL's claim for its own damages through an assignment of SDC's breach of contract claim.

The second issue related to whether SDC could assert a breach of contract claim or a negligence claim. Under the second issue, SDC argued alternatively that either it had a viable breach of contract claim or that an exception to the economic loss rule

allowed it to assert a negligence claim. The Court of Appeals properly disposed of SDC's claims on procedural grounds.

First, the breach of contract claim was barred because SDC had failed to prove its damages. The trial court granted RB&G's second motion for summary judgment on this issue, and the Sunridge entities agreed to not appeal any issues relating to SDC's damages as part of the stipulation resolving the case.

Second, SDC's alleged damages for breach of contract and negligence were identical. SDC did not attempt to differentiate its damages under either theory, rather its negligence and breach of contract claims were alternative theories seeking the same relief. Accordingly, the second summary judgment motion and the parties' stipulation that these issues would not be appealed is dispositive of SDC's damages for both a contract claim and a tort claim.

Finally, on appeal, the Sunridge entities were only seeking to recover SEL's damages for the lost 14 units. Thus, even if the economic loss rule did not bar SDC's negligence claim and SDC's damages were properly part of the appeal, SDC could never recover SEL's damages through its own negligence claim. Additionally, SDC never

raised the independent duty exception or the special relationship exceptions to the economic loss rule before the trial court. (R. at 384-89)[1]

Based on these procedural defects, the Court of Appeals properly disposed of SDC's remaining issue on appeal. Specifically, the Court of Appeals correctly noted that any arguments related to SDC's damages were not properly raised. *See Sunridge Development Corp.* at ¶9. Because of the claims and issues the Sunridge entities presented to the Court of Appeals, the Court of Appeals properly addressed each issue and correctly affirmed the trial court's rulings on RB&G's motions for summary judgment.

SUMMARY OF ARGUMENTS

As the Sunridge entities correctly point out in their brief, the only issue before the Court of Appeals and before this Court is a claim for damages for the lost 14 units. The Sunridge entities' brief concedes that the Sunridge entity that incurred the damages for the lost 14 units was SEL. Thus, the issue is whether the Court of Appeals properly determined that claims and issues raised on appeal allowed for either Sunridge entity to recover damages for the lost 14 units.

[1] Before the trial court, the Sunridge entities argued these two exceptions to the economic loss rule as they related to only SEL's negligence claim. On appeal, however, the Sunridge entities abandoned these arguments as they related to SEL and advanced them only with respect to SDC.

Absent an assignment of claims from SEL to SDC, the only Sunridge entity that could recover the damages sought on appeal is SEL because it was the entity that allegedly incurred these damages. In this case, however, SDC assigned its claims to SEL, rather than from SEL to SDC. This assignment does not allow SEL to recover SEL's own damages through SDC's breach of contract claim.

Moreover, based on the trial court's ruling on the second summary judgment motion and the parties' stipulation to not appeal the order granting summary judgment or any issues relating to SDC's damages, SDC cannot argue that its damages included the lost 14 units or that genuine issues of fact existed with respect to its damages. This Court should affirm the Court of Appeals because neither Sunridge entity has presented a legal basis on which to recover SEL's damages for the lost 14 units.

ARGUMENT

I. The only relief for breach of the SDC/RB&G contract, whether asserted by SDC or SEL, is SDC's damages, not SEL's.

Whether the breach of contract claim is asserted by SEL, by virtue of an assignment, or by SDC, as a direct claim, the measure of damages that can be recovered is limited to those damages that SDC could recover. In this case, both SDC and SEL asserted a breach of contract claim. The Sunridge entities argued that SDC purportedly assigned all of its rights and interests in its contract with RB&G to SEL. As set forth

below, Utah law precludes either Sunridge entity from recovering SEL's damages through a breach of the SDC/RB&G contract.

a. SEL cannot recover its own damages through an assigned claim.

As an assignee, SEL stands in SDC's shoes and not in a better position. Utah law provides that the assignee is limited to recovery of only the assignor's damages when asserting an assigned claim. An assignee may assert the claims that an assignor could have asserted, but nothing more than that. *See Aird Ins. Agency v. Zions First Nat'l Bank*, 612 P.2d 341, 344 (Utah 1980); *West v. Inter-Financial, Inc.*, 2006 UT App 222, n.1, 139 P.3d 1059. An assignee stands in the shoes of the assignor and never stands in a better position than the assignor. *See SME Industries, Inc. v. Thompson, Ventuleet, Stainbrack and Associates, Inc.*, 2001 UT 54, ¶35, 28 P.3d 669. In this case, SEL seeks to assert SDC's breach of contract claim, but it seeks to recover its own more substantial damages. Utah law precludes SEL from augmenting SDC's claim.

In his dissent, Judge Bench correctly noted that the "assignee's damages are limited to those damages the assignor would have suffered . . . ." *See Sunridge Development Corp. v. RB&G*, 2007 UT App 29 at ¶15. This is consistent with the majority's opinion. *See id*. at ¶8. Thus, both the majority and Judge Bench agree that the assignee, SEL, is limited to those damages that the assignor, SDC, could assert. *See id*. at ¶¶8, 15. Moreover, both the majority and Judge Bench correctly cite to Utah law for this proposition. *See Aird Ins.*, 612 P.2d at 344; *West*, 2006 UT App 222 at n.1. Judge Bench

then departs from the majority in two respects: (1) he states that SEL should not have to rely on SDC to litigate its claims, and (2) he states that the record included evidence of damages. The Sunridge entities try to pick up on Judge Bench's analysis in Points I through IV of the brief, arguing that the trial court and Court of Appeals erred in concluding that Enterprises could not recover its own damages.

First, the issue of whether or not a genuine issue of fact would preclude summary judgment is not before this Court. Judge Bench cited to the Affidavit of Stephen Stewart to argue that an issue of fact existed as to damages. Judge Bench relied on *Holbrook Co. v. Adams*, 542 P.2d 191, 193 (Utah 1975) to hold that "one sworn statement" is enough to create an issue of fact. In this case, however, this affidavit was presented in opposition to RB&G's first summary judgment motion. The breach of contract claim, whether asserted by SDC directly or by SEL through an assignment, survived the first summary judgment motion. After the close of discovery, however, RB&G challenged the sufficiency of the SDC's damages and the affidavit through its second summary judgment motion. The trial court correctly determined that the affidavit's generalized statement of damages was insufficient without the underlying documentation or other evidence to prove the general and conclusory statements in the affidavit. The parties then stipulated that the trial court's ruling on this issue would not be appealed. Accordingly, SDC cannot claim that issues of fact with respect to damages precluded summary judgment.

This said, Judge Bench and the Sunridge entities, however, unduly complicate the analysis. Once the Court of Appeals correctly acknowledged that an assignee is limited to an assignor's recovery, no further analysis is needed as to who should litigate the claim and whether the record contained evidence of SDC or SEL's damages. *See id*.; *see also Havsy v. Flynn*, 945 P.2d 221, 223 (Wash. App. 1997) (plaintiff/assignee could not recover on assigned claims where assignor had not incurred any damages to assign); *Kurent v. Farmers Ins. of Columbus, Inc.*, 581 N.E.2d 533, 537 (Ohio 1991) (although assignee had incurred its own damages, the assignee could not recover in subrogation action where the assignor had no right to recovery); *Arnold M. Diamond, Inc. v. Gulf Coast Trailing Co.*, 180 F.3d 518, 524 (3rd Cir. 1999) (assignee could not recover its own additional damages and was limited to only assignor's damages). Whether SEL was given an opportunity to litigate its own damages claim through SDC's assignment and whether the record contained sufficient proof of SEL's damages was irrelevant because Utah law precluded SEL from recovering its own damages.

Moreover, an assignee cannot augment an assignor's damages claim by paying the assignor. *See Nova Information Systems, Inc. v. Greenwich Ins. Co., NAC*, 365 F.3d 996, 1004 (11th Cir. 2004) (even though assignor incurred a loss because it paid its assignee's claim, the assignee could not recover on assigned claim where assignee had already been reimbursed for its loss and had no damages to assign); *State v. Lester*, 608 P.2d 588, 589-90 (Or. App. 1980) (even though State had made payments to mother, State could not

recover on assignment from mother where divorce decree did not require father to make payments to mother). Thus, SEL could never recover its own damages through an assignment of SDC's breach of contract claim.

The Sunridge entities concede that the only damages that are part of this appeal are SEL's damages for the lost 14 units. *See* Sunridge Brief at p. 8. Because SDC did not incur theses damages and SEL is limited to only what SDC could recover, Utah law precludes SEL from recovering its own damages through an assigned breach of contract claim. This Court should affirm the Court of Appeals' conclusion that the trial court properly granted summary judgment on SEL's attempt to recover its own damages through an assigned breach of contract claim.

b. SDC is limited to its own damages.

SDC cannot recover the damages incurred by a separate and distinct legal entity. In Point VI, SDC argues that if SEL cannot recover through the assignment of SDC's breach of contract claim then SDC remains in privity of contract and it can recover "consequential damages flowing from RB&G's breaches." The Sunridge entities further argue that whether SDC was in privity is "factual issue."

Although SDC purportedly assigned its breach of contract claim to SEL, SDC asserted its own breach of contract claim to the trial court. In fact, SDC's breach of contract claim was the only one of the four claims asserted in the Sunridge entities' complaint that survived the trial court's ruling on RB&G's first summary judgment

motion. (R. at 538) Whether or not SDC is in privity of contract is not a factual issue, rather it is a legal conclusion. Furthermore, RB&G would concede that SDC was in privity of contract with RB&G. No dispute exists as to who was a party to the contract, rather the dispute is whether RB&G breached the contract, and if a breach occurred, what were SDC's damages from the breach.

The measure of SDC's damages was the subject of the second summary judgment motion. In this motion, RB&G, for purposes of the motion, assumed it had breached the contract and argued that SDC had failed to prove its damages. The trial court agreed and granted SDC's second summary judgment motion, concluding that SDC's breach of contract claim failed for lack of proof of damages. Thereafter, the parties resolved this issue and entered into a stipulation whereby SDC agreed not to appeal the second summary judgment motion and whether or not SDC could prove its damages.

Even if SDC had not stipulated that its ability to prove its damages would not be an issue on appeal, SDC has not provided this Court with any authority that it can recover SEL's damages through SDC's breach of contract claim. Furthermore, RB&G is not aware of any Utah law that would allow two separate and distinct entities to pool their damages in order to assert a larger claim in a breach of contract action.

Finally, because SDC asserted its own breach of contract claim after it assigned its breach of contract claim to SEL, SDC's own act would affirmatively impair SEL's ability to assert and recover through the assigned claim. Only one Sunridge entity can assert

SDC's breach of contract claim. As party to the contract with RB&G, SDC could assert its own direct breach of contract claim; or, SDC could assign its breach of contract claim to SEL. In either case, the amount of recovery is limited to those damages that SDC could recover. Furthermore, Utah law provides that the acts of the assignor after an assignment are binding on the assignee. *See Wiscombe v. Lockhart Co*., 608 P.2d 236, 238 (Utah 1980). As set forth in *Wiscombe*, when an assignor assigns a portion of its rights under a contract but remains a party to the assigned contract, the assignee's rights are subject to the actions of the assignor. *See id*. (holding assignee could not cure the assignor's default on a real estate purchase contract). Accordingly, one, but not both, of the Sunridge entities could assert SDC's breach of contract claim. Regardless of which one asserted the claim, the Court of Appeals correctly affirmed the trial court's rulings.

II. The Sunridge entities have not articulated a basis or provided any authority to support how SDC could recover SEL's damages through a tort claim.

a. Waiver

While this case was pending before the trial court, SDC never articulated a basis for which RB&G owed an independent duty, nor did it state how a special relationship was created. (R. at 362-90, wherein the only argument asserted was that RB&G owed SEL an independent duty) With respect to all arguments relating to whether RB&G owed SDC an independent duty or whether a special relationship was created, the Sunridge entities did not make these arguments to the trial court and raised them for the first time on appeal. Because the trial court had no opportunity to rule on these issues,

the Sunridge entities should not be able raise them for the first time on appeal before the Court of Appeals or to this Court. *See Coleman v. Stevens*, 2000 UT 98, ¶9, 17 P.3d 1122.

b. SDC

After assigning all of its rights under its contract with RB&G, SDC argues that since it now lacks privity of contract then it, rather than SEL, has a viable tort claim against RB&G. In Point VII of the brief, SDC sets forth arguments for why it should be able to recover in tort from RB&G. Although SDC goes to great lengths to articulate the legal bases for recovery, SDC fails to set forth any legal basis by which it could recover SEL's damages through its own tort claim. Furthermore, SDC acknowledged that it assigned all of its claims to SEL in the purported assignment. Sunridge Brief at p. 6.

Assuming SDC had a viable tort claim, SDC's damages are limited to its own damages. As the brief clearly articulates, the only damages that are part of the appeal are SEL's damages for the lost fourteen units. Since these damages are solely SEL's, SDC cannot recover those damages incurred by a separate legal entity.

Furthermore, SDC's damages in tort are the same as its breach of contract claim. SDC's damages failed for lack of proof, and the trial court granted RB&G's second summary judgment motion. Thereafter, the parties stipulated that SDC's damages would not be appealed. Consistent with this stipulation, the Sunridge entities' brief clearly

states the only damages that are being sought are SEL's damages. Thus, SDC cannot claim the trial court erred or it was not given an opportunity to prove its damages due to RB&G's alleged breach.

c. SEL

Although SEL asserted a tort claim before the trial court, SEL abandoned this claim before the Court of Appeals and now on Certiorari to this Court. Because SEL has not presented any argument to recover its own damages through a tort claim, RB&G declines to brief this claim.

d. Economic Loss Rule

i. Independent Duty Exception

Despite the fact that SDC cannot recover SEL's damages through a tort claim and the fact that SEL has abandoned its tort claim, RB&G will discuss the application of the economic loss rule to this case.

The Sunridge entities' primary argument as to why the economic loss rule does not bar a tort claim is based on the independent duty exception. Under this exception, the economic loss rule will not bar a claim for negligence that seeks to recover solely economic losses when a party owes an independent duty of care that arises separate from that parties' contractual duty of care. *See Hermansen v. Tasulis*, 2002 UT 52, ¶17, 48 P.3d 235. SDC argues that RB&G owed it an independent duty, arising from a general

common law duty. While it is true that Utah recognizes a narrow exception to economic loss rule when a party owes an independent duty, the independent duty exception is not applicable in this case where RB&G's duties arise solely from its contract with SDC. In other words, SDC reads the "independent" requirement out of the independent duty exception. As set forth below, the only duty between SDC and RB&G arose from the parties' contract.

In *Hermansen v. Tasulis*, this Court modified Utah's economic loss rule in order to create a narrow exception to the general bar on recovery of solely economic damages when a duty exists that is independent of and separate from the contractual duties. *See Hermansen*, 2002 UT 52, ¶17, 48 P.3d 235. In creating this exception, however, the Court did not abandon the original concept behind the economic loss rule, and stated: "[t]he proper focus in an analysis under the economic loss rule is on the source of the duties alleged to have been breached." *Hermansen*, 2002 UT 52 at ¶¶15-16 (*quoting Grynberg v. Agric. Tech, Inc.*, 10 P.3d 1267, 1269 (Colo. 2000) (emphasis added)). The Utah Supreme Court has modeled Utah's economic loss rule on the Colorado rule. *See Hermansen v. Tasulis*, 2002 UT 52, ¶¶15-16 (*quoting Grynberg*, 10 P.3d at 1269). The Colorado Supreme Court explained the Colorado rule in a later case:

> Our economic loss rule requires the court to focus on the contractual relationship between the parties, rather than their professional status, in determining the existence of an independent duty of care. The interrelated contracts contained [defendant's] duty of care. [Plaintiff's] tort claims are

> based on duties that are imposed by contract and therefore, contract law provides the remedies.

BRW, Inc. v. Dufficy & Sons, Inc., 99 P.3d 66, 67-68 (Colo. 2004) (addressing multiple inter-related contracts between commercially sophisticated parties on a large construction project).

In order to determine if the independent duty exception applies, a two-step analysis is used: (1) are the losses purely economic, and (2) what is the source of the duty being imposed. *See Gulfstream Aerospace Services Corp. v. United States Aviation Underwriters, Inc.*, 635 S.E.2d 38, 44 (Ga. Ct. App. 2006) (applying Utah's economic loss rule and finding source of duty was contractual rather than independent). If the losses are purely economic and the source of the duty is contractual, "it is improper to further analyze the existence of an independent tort duty in determining whether an economic loss may be recovered." *See id.* In short, the first step is to look at the contract to determine if it provides the source of the duties being alleged. If a contract is the source of the duties alleged, the court does not need to determine if a parallel or overlapping duty exists.

In this case, neither party disputes that the Sunridge entities' damages are purely economic. Thus, the analysis turns on the source of the duty being imposed. The Sunridge entities argue that professional engineers owe a duty to the public at large to perform competently, professionally, and thoroughly. Thus, the Sunridge entities argue

that it was foreseeable that if RB&G breached its professional duty than either entity could recover purely economic damages.

RB&G owed no independent duty to either Sunridge entity or the public at large to produce geologic reports on the subject property involved in this case. RB&G entered into a contract with SDC to perform this analysis. If the reports were deficient, any damages are traceable solely to the reports and RB&G's contractual obligations. Stated differently, neither Sunridge entity can seek economic damages that arise independently of the contract or the reports. Assuming engineers owe the general public a general duty of care, this independent duty of care was not breached and was not the proximate cause of the damages which either Sunridge entity attempted to recover. Any damages in this case flow directly and solely from the contract between RB&G and SDC. As such, no independent duty exists that would allow either Sunridge entity to recover damages from RB&G. To the extent that RB&G breached a duty, it was a contractual duty. As such, the independent duty exception is not applicable to SDC’s claim.

ii. Special Relationship

In arguing that RB&G had a "special relationship" with its client, the Sunridge entities are attempting to completely eviscerate long standing principles of tort and contract law and, ultimately, to effectively gut the economic loss doctrine. The Sunridge entities' brief argues that RB&G's special relationship derives from the following: "information asymmetry, engineers' esoteric knowledge and expertise, and their clients'

reliance thereon." In sum, because engineers have specialized knowledge, whether it be esoteric or not, and because a client relies on this specialized knowledge, the Sunridge entities argue a special relationship is created between engineers and those that contract with them. The Sunridge entities' argument is that anytime a professional possesses specialized knowledge upon which someone relies then a special relationship is created. Thus, all professionals, according to the Sunridge entites, have a special relationship with not only their clients, but anyone else who might ever rely on the professional's expertise in making economic decisions.

As discussed above, the Sunridge entities attempt to do an end run around basic principles of contract law in order to create a cause of action in tort. In so doing, the Sunridge entities strain to create an independent duty running from professionals to clients and also now to form a special relationship. The only reason RB&G provided its professional expertise and opinions as to the geology of the land underlying the Sunridge project was because it entered into a contract to do so. Absent this contract, RB&G would not have offered any opinions or services on this project. The contract provided for the scope of RB&G's services and the compensation that RB&G would receive.

In support of its special relationship argument, the Sunridge entities cite to numerous cases in Utah which they claim support their position. Each case, however, is inapposite. Specifically, in three of the cases, the court did not address the issue of whether a special relationship existed. *See West v. Inter-Financial, Inc.*, 2006 UT App

222, 139 P.3d 1059; *Price-Orem Investment Co. v. Rollins, Brown and Gunnell, Inc.*, 713 P.2d 55 (Utah 1986); *Milliner v. Elmer Fox and Co.*, 529 P.2d 806 (Utah 1974). In two of the other cases cited by the Sunridge entities, *Yazd v. Woodside Homes Corporation*, 2006 UT 47, 143 P.3d 283, and *Hermansen v. Tasulis*, 2002 UT 52, 48 P.3d 235, the Supreme Court, in the context of determining whether a legal duty existed, discussed that the existence of a special relationship may give rise to a legal duty; however, the Court's holdings merely determined that a legal duty existed given the facts and circumstances of the case. *See Yazd*, 2006 UT 47 at ¶¶11-26 (developer-builder may owe buyer of home a legal duty); *Hermansen*, 2002 UT 52 at ¶¶18-23 (seller's real estate agent owes duty to buyer of home).

The other case relied on by the Sunridge entities to support its special relationship argument is *Webb v. University of Utah*. As stated in *Webb*, "when used in the context of ordinary negligence, a special relationship is what is required to give rise to a duty to act . . . ." *Webb v. University of Utah*, 2005 UT 80, ¶12, 125 P.3d 906. In contrast to *Webb* where the parties had no contractual relationship, the source of the duty in this case is clearly set forth in the contract. Absent the contract, RB&G owed no duty to act to either SDC or SEL. Once the source of the duty is found to be a contract, the inquiry as to whether an independent duty or special relationship exists ends. *See Hermansen*, 2002 UT 52 at ¶15-16; *Gulfstream*, 635 S.E.2d at 44.

In other words, what gives rise to RB&G's duty to act is not a "special relationship." Rather, it is a bargained for contract which defines the scope of services that RB&G is obligated to provide. RB&G had no obligation to provide more than what the scope of the contract required, and the contract did not transform the relationship between RB&G and Development into a "special relationship." To the extent, RB&G failed to fulfill its contractual obligation, the sole remedy is a claim for breach of contract. *See BRW, Inc.*, 99 P.3d at 67-68. SDC had a breach of contract claim, and it asserted it in this case.

This is not a case where the law has not provided SDC an appropriate remedy. In contrast to those cases where a homeowner would be without a remedy absent an exception to the economic loss rule, *see, e.g., Yazd and Moore,* SDC had a remedy. Its remedy was a breach of contract claim. The economic loss doctrine preserves the sanctity of the contract claim and requires that parties enforce these rights and obligations through contract actions rather than tort actions.

In addition, RB&G had no reason to know that SEL or other third parties would rely on its work. At the time that Development and RB&G entered into the contract, SDC was the owner and developer of the project and SEL had not been formed. RB&G could not reasonably foresee that SDC would sell the land to SEL and enter into a purported assignment with a sister entity when that entity was not in existence at the time the contract was entered into and at the time RB&G performed its obligations under the

contract. As such, the Sunridge entities' reliance on *Milliner v. Elmer Fox and Co.*, which holds an accountant liable when the accountant knew that a report would be relied upon by third parties, is distinguishable because RB&G had no ability to know a yet to be formed entity would rely on its report on this project. *See Milliner v. Elmer Fox and Co.*, 529 P.2d 806, 808 (Utah 1974). SDC's remedy for any alleged breach of duty was a breach of contract claim. To the extent it could not recover SEL's damages, this was a product of the Sunridge entities own doing in an attempt to limit their own exposure to a liability claim.

III. Any predicament in which the Sunridge entities now find themselves is a product of their own decision to limit their own liability exposure.

The situation that the Sunridge entities now find themselves in is a product of their own making, and they must accept the reciprocal obligations and limitations of their corporate structure. The Sunridge entities may not evade the consequences of their corporate form. SDC created SEL to benefit from its separate corporate identity, namely to avoid liabilities. Having created a separate corporate structure, SEL must also accept the burdens of its separate existence.

Utah law recognizes the importance of the separate legal identities of corporations and has been unwilling to permit parties to ignore the distinctions. *See Sachs v. Lesser*, 2007 UT App 169, ¶51, 163 P.3d 662, *cert. granted* 168 P.3d 1264. As this Court noted: "[corporate entities] should not be permitted to enjoy the benefits of [a company's] separate corporate structure for some purposes while also claiming it elevates form over substance" when it is inconvenient for another purpose. *Sachs*, 2007 UT App 169 at ¶51

(*citing Utah State Rd. Comm'n v. Steele Ranch*, 533 P.2d 888, 891 (Utah 1975)). The general rule is that "where persons organized a corporation to acquire the advantages flowing from its existence as a separate entity, they should not be able to disregard the corporate entity to gain an advantage for another purpose." *Steele Ranch*, 588 P.2d at 891.

The Sunridge entities chose to form SEL to benefit from its separate corporate existence. The Sunridge entities cannot reap the benefits of SEL's incorporation while evading the consequences to suit their convenience. In this case, the very device that the Sunridge entities used to shield themselves from liability is their undoing on their own claim. Certainly, the Sunridge entities would not excuse the corporate formalities if the shoe was on the other foot and RB&G was attempting to sue SEL for breach of contract.

CONCLUSION

Based on the foregoing facts and authorities, this Court should affirm the Court of Appeals ruling in this case. SDC and SEL have failed to articulate any legal bases to allow either party to recover SEL's damages for the lost 14 units.

DATED this _____ day of July, 2008.

RICHARDS, BRANDT, MILLER & NELSON

_____

CRAIG C. COBURN
ZACHARY E. PETERSON
Attorneys for Appellee, RB&G

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing brief was mailed, first-class, postage prepaid, on this _____ day of July, 2008, to the following:

Stephen Quesenberry, Esq.
Charles Perschon
HILL, JOHNSON & SCHMUTZ, LLC
RiverView Plaza
4844 North 300 West, Suite 300
Provo, UT 84604

_____